

Attorney Docket Number: P51380

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicants:	Jeffrey Axten et al.	January 14, 2010
Patent No.:	7,618,959	Issue Date: November 17, 2009
Serial No.:	10/533,501	Group Art Unit No.: 1624
Filed:	May 02, 2005	Examiner: K. Habte
For:	ANTIBACTERIAL AGENTS	

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REQUEST FOR RECONSIDERATION OF PATENT TERM UNDER 37 CFR §1.705(d)

This is a request for reconsideration of patent term adjustment pursuant to 37 CFR §1.705(d), according to which the applicant may request reconsideration within two months from the date the patent issued if the patent indicates or should have indicated a revised patent term adjustment. Applicant respectfully seeks 405 days of patent term adjustment in addition to the 565 days stated on the Issue Notification for a total of 970 days. Accompanying this request is the required processing fee set forth in 37 CFR § 1.18(e). The statement of facts supporting this request is set forth below pursuant to 37 CFR §1.705(b)(2).

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**Relevant Dates:**

Priority date: November 05, 2002  
PCT Filing date: November 04, 2003  
35 U.S.C. 371(c) completion date: May 02, 2005  
3-year pendency ending date: May 02, 2008  
First office action mailing date: January 18, 2008  
RCE filing date: June 11, 2009  
Issue date: November 17, 2009

**A delay**

The Patent Office calculated A delay to be 565 days caused by the failure of the Office to issue the first office action within 14 months from the 371(c) completion date. Applicants agree that the period beginning on July 02, 2006 (14 months from the 371 (c) completion date) and ending on January 18, 2009 (the mailing of the restriction requirement) spans 565 days.

**B delay**

Under 35 U.S.C. § 154(b)(1)(B), delay caused by the failure of the Office to issue a patent within 3 years is assessed in accordance with 37 CFR §1.703 (b) (B delay). The term of a patent shall be extended 1 day for each day after the end of that 3-year period until the patent is issued, not including any delay in the processing of the application requested by the applicant.

The starting date of the 3-year period is set forth in 35 U.S.C. 371(b): "Subject to subsection (f) of this section, the national stage shall commence with the expiration of the applicable time limit under article 22(1) or (2) or under article 39(1) of the [PCT] treaty." According to the above, the national stage of the present application commenced on May 02, 2005; therefore the 3-year pendency ended May 02, 2008. The total B delay, therefore, begins on May 02, 2008 and ends on the issue date, November 17, 2009; however, according to 37 CFR §1.703(b)(1), the period of adjustment for B delay does not include the number of days from the date of a request for continued examination (RCE) to the date the patent was issued. Therefore, the B delay time runs from May 02, 2008 until June 11, 2009 — the date of Applicants' RCE filing — for a total of 405 days.

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Total of A and B delay

The total of A and B delay is 565 days A delay plus 405 days B delay for a total of 970 days.

Applicant delay

No delay was caused by Applicants.

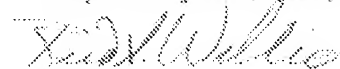
Overlapping period and total patent term adjustment

According to § 1.703(f), the term of a patent is entitled to adjustment under § 1.702 and the term shall be adjusted for the sum of the periods calculated under paragraphs (a) through (c) of this section, to the extent that such periods are not overlapping, less the sum of the periods calculated under § 1.704.

In *Wyeth v. Kappos* 2009-1120 (Fed. Cir., 2010) the Federal Circuit upheld the US district court for DC's holding that the only way periods of time can "overlap" is if the A and B delays occur on the same day, and that the B delay begins when the PTO has failed to issue a patent within three years, not before. In the present case, there is no overlapping A and B period since the A period ended prior to May 02, 2008, the beginning of the B period.

Accordingly, the U.S. Patent 7,618,959 is entitled to a total of 970 days of patent term adjustment, which represents an additional adjustment of 405 days. Applicant therefore respectfully request reconsideration of the patent term adjustment for this patent. If a telephone conference would help the Office determine this matter, the Office is encouraged to call the undersigned attorney.

Respectfully submitted,



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